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Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-733

JOHN E. KALIN,

Petitioner,

vs.

N. E. YOUNGBLOOD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal for the Second Appellate District of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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1. Introductory Statement.

This is an attorney malpractice action. Mr. Kalin, the petitioner, sued the attorneys who had represented him in a defamation action against his former employer. The malpractice action proceeded to trial, with Mr. Kalin appearing *in propria persona.* After the trial court exercised its power to direct the order of proof, Mr. Kalin failed to appear at the trial. The trial court then granted defense motions to dismiss. Mr. Kalin appealed, but the judgment of dismissal was affirmed. Mr. Kalin's petition for rehearing in the California District Court of Appeal and petition for hearing in the California Supreme Court were denied. Mr. Kalin then filed the instant Petition for Writ of Certiorari.

Respondent N. E. Youngblood's (hereinafter "Respondent") position regarding this position is simply stated:

(1) There is no reason why this Court should grant this Petition, under the general guidelines set forth in Rule 19, Supreme Court Rules;

(2) The trial court did not in any way infringe on Mr. Kalin's Constitutional rights, but rather was left with no choice but to dismiss the action after Mr. Kalin failed to appear.

Respondent has searched the Petition before this Court in an attempt to find the substantial constitutional questions that would justify the granting of the Petition. This search has been in vain. In fact, all that could be found was Mr. Kalin's same vindictive attack on the trial court, now coupled with a similar barrage on the California Court of Appeal. Mr. Kalin has again insisted on going beyond the record, and has thoroughly camouflaged the true issues that were presented to the California Court of Appeal.

Before discussing the real issues in this case, respondent feels constrained to clarify one matter at the outset. At every stage of the proceedings, and at numerous points in his Petition for Writ of Certiorari, Mr. Kalin has consistently reminded the various courts that he was representing himself. There can be no doubt as to the motivation for this tactic—Mr. Kalin has been and still is making an unabashed attempt to curry the Court's favor. It is well settled, however, that a person who chooses to represent himself is entitled to no special handling from the court.[1]

[1]*See, e.g., Mazique v. Mazique,* 356 F.2d 801, 805-06 (D.C. Cir., 1966), *cert. denied* 384 U.S. 981, 86 S.Ct. 1882, 16 L.Ed.2d 691 (1966); *Lombardi v. Citizen's National Bank,* 137 Cal.App.2d 206, 209, 289 P.2d 323 (1955); *Monastero v. Los Angeles Transit Co.,* 131 Cal.App.2d 156, 162, 280 P.2d 187 (1955).

Even though the law is clear, it appears that, in practice, trial courts bend over backwards to afford parties appearing *in propria persona* every possible chance to state a case. As a record in this case clearly illustrates, the trial court actually led Mr. Kalin by the hand:

> "During the trial, the Court instructed plaintiff at various times on the proper method of questioning witnesses, placing interrogatories in evidence, admitting documents under the business records exception, and making an offer of proof." *Kalin v. Youngblood,* Unpublished Opinion of the California Court of Appeal, Petition for Writ of Certiorari, p. 7.

Certainly no trial court would go to such lengths with an attorney.

Mr. Kalin has seized upon the trial court's statement that it was well aware of the feelings of the courts of California toward "pro pers." As was shown above, the theoretical position of the California courts is that "pro pers" are to be treated equally, although in practice they are given preferential treatment. The Court of Appeal found, and the record amply shows, that Mr. Kalin was in fact given every possible chance to prove a case. His claim of judicial misconduct is simply nonsense.

Phantom issues such as this claimed judicial bias mask the gaping hole in Mr. Kalin's argument. Judgment was rendered against him because he simply refused to proceed with the trial. Our judicial system

would be reduced to a state of utter chaos if a plaintiff, whether represented by counsel or *in propria persona*, could willy nilly appear or not appear at trial. Mr. Kalin's boycott[2] of the trial is completely understandable—he knew he could not prevail because he simply did not have a good case. Nevertheless, our system of justice cannot function under these circumstances.

It should be pointed out that the record before this Court contains not even a scintilla of evidence tending to substantiate Mr. Kalin's claim that he was prevented from attending the trial because of an illness. Mr. Kalin did make many statements to the trial court to the effect that he was ill, but supported these statements with no evidence whatsoever. The trial judge, who had the opportunity to observe Mr. Kalin firsthand, decided that these claims of illness were sham. In this regard, it was interesting to note that the illness claims only occurred following a ruling from the Court that Mr. Kalin felt was adverse to his position —there were no such claims made after Mr. Kalin prevailed over defense motions. The Court's determination that Mr. Kalin's "illness" was feigned is wholly supported by the record.

This answer will not address itself to Mr. Kalin's claims that his rights were violated because the Court of Appeal did not consider the "collateral matters" raised in Mr. Kalin's brief. It was Mr. Kalin's responsibility to make those citations of error a part of his appeal in a proper manner, but he did not do so. Thus, Mr. Kalin has waived his rights in this regard.[3]

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[2]This was the word used by the California Court of Appeal to describe Mr. Kalin's actions in failing to appear. Respondent feels it to be a very appropriate choice.

[3]The "collateral matters" refer, apparently, to numerous rulings of the lower court, and, apparently, also to prior rulings by the California Courts of Appeal. It should be pointed out that Mr. Kalin has had a great deal of experience in taking cases to the appellate level. In fact, all of the cases in which respondent has been involved have gone to the Appellate Court, except, perhaps, for the most important one of all. Mr. Kalin did not appeal the judgment rendered against him in his original defamation action against Aerospace.

In short, there is simply no reason for this Writ to be granted. The Court below properly dismissed plaintiff's action when, after repeated warnings, he failed to appear and continue the prosecution of the action. The record does not support Mr. Kalin's claim that the trial court was biased or prejudiced against him.

2. The Plaintiff's Action Was Properly Dismissed After He Failed to Appear.

It is beyond question that the trial court has not only the *power* but also the *duty* to control proceedings before it. In the instant case, the court was left with very little choice after the plaintiff refused to appear. It could have acquiesced in the plaintiff's usurpation of its power, left its doors open, and ordered the defendants and defendants' counsel to wait until the plaintiff decided to attend court, or it could have dismissed the action.

Mr. Kalin has gone on at length to explain how a claimed physical disability prevented his being in Court. It should be noted, in this regard, that not only was there no *evidence* of the disability presented to the lower court, there was not even a request for continuance. All that the record shows is that the plaintiff simply refused to attend. The record further shows that the refusal to attend came on the heels of the Court's order that the plaintiff make an offer

of proof as to how he was going to proceed in the case. Such an order is, of course, completely proper. See *California Evidence Code*, Section 320, which gives the trial court the power to regulate the order of proof.

The Court's requirement that a physician personally appear and testify as to plaintiff's alleged "illness" is within the discretion of the Court. The trial court was in a position to evaluate the plaintiff, and in fact determined that the plaintiff's illness was a complete sham.[4] Mr. Kalin was given every opportunity to submit evidence to the contrary, but chose not to do so. His failure to even attempt to comply with the Court's legitimate orders must defeat his present claims.

3. Mr. Kalin's Interpretation of the Word "Abandonment" Is Sophomoric.

In his Petition, Mr. Kalin has cited several Federal cases discussing the word "abandonment." These cases are criminal cases and dealt with the abandonment of property, the abandonment of places of habitation, and the like. They simply have nothing to do with the abandonment of a trial.

The California Court of Appeal cited the case of *Taecker v. Parker,* 34 Cal.App.2d 143, 94 P.2d 197 (1939), in support of its affirmance of the lower court's holding that Mr. Kalin had abandoned his case. In the context of the instant action, the *Taecker* decision is one hundred per cent in point, and the decision of the California Court of Appeal is completely proper. Mr. Kalin simply abandoned his case.

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[4]See, *e.g.*, R.T. 431-32; 445-46.

4. The Trial Court Was Not Guilty of Bias, Prejudice or Judicial Misconduct, and Did Not Violate Mr. Kalin's Constitutional Rights.

The record in the Court below shows, without question, that the trial court was most lenient in dealing with Mr. Kalin. The record shows that the trial court ruled in Mr. Kalin's favor on respondents' motion to dismiss pursuant to California Code of Civil Procedure, Section 583(b) [R.T. 50:24-25]; the trial court ruled in favor of Mr. Kalin on the question of whether proper notice of trial was given [R.T. 51:11-12]; the trial court ruled in favor of Mr. Kalin on the motion of respondents for non-suit after Mr. Kalin's opening statement [R.T. 249:15-16]; and the court ruled in Mr. Kalin's favor in denying respondents' motion for sanctions [R.T. 447:16-17]. Time and time again the trial court requested offers of proof from Mr. Kalin after respondents raised materiality or relevance objections to Mr. Kalin's questions. Mr. Kalin steadfastly refused to make offers of proof [See, *e.g.*, R.T. 190:4-196:9; 257:21-258:3; 305:28-307:11]. The trial court gave Mr. Kalin a lesson in how to ask a question properly, so that perhaps not quite so many defense objections would be sustained [R.T. 280:6-285:18]. The trial court even went so far as to instruct Mr. Kalin in how to get certain materials into evidence via the business records exception to the hearsay rule [R.T. 397:25-403:13].

Simply stated, there was no judicial misconduct, or prejudice against Mr. Kalin.

5. Conclusion.

The record before this Court contains numerous reminders by Mr. Kalin that he is not an attorney. In this context, a statement from the case of *Monastero v. Los Angeles Transit Co.*, 131 Cal.App.2d 156, 162, 280 P.2d 187 (1955), becomes quite appropriate:

> "Experience in trial of cases indicates that all too often litigants who appear *in propria persona* deliberately attempt to capitalize upon their own ignorance or appearance of ignorance."

Mr. Kalin is not quite so naive as his Petition might lead one to think. He is a court-wise litigant[5] who, frankly, does not need anyone's help in protecting his rights. Notwithstanding this fact, the trial court scrupulously guarded Mr. Kalin's rights to the extent humanly possible, and only dismissed the action after Mr. Kalin abandoned his case. There is no constitutional issue involved, and it is therefore submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

BARRY T. HARLAN,

Attorney for Defendant and Respondent, N. E. Youngblood.

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[5]In footnote 2 of the Opinion from the California Court of Appeal, certain of Mr. Kalin's other lawsuits are set forth. It is not mentioned in that footnote, but Mr. Kalin has filed another, similar lawsuit in the United States District Court for the Central District of California where, again, Mr. Kalin is suing numerous individuals and entities over, essentially, the same facts as are present in the instant case. Respondent is advised that Mr. Kalin is presently appealing the dismissal of that case to the Court of Appeal for the Ninth Circuit.